No. 06-939

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

EDMUND G. BROWN, JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the National Labor Relations Act, 29 U.S.C. 151-169, preempts a California law that prohibits private employers that receive state grant and program funds from using those funds "to assist, promote, or deter union organizing," Cal. Gov't Code §§ 16645.2, 16645.7 (West Supp. 2007).

TABLE OF CONTENTS

Page

Statement 1
Discussion 8
I. The decision below departs significantly from this Court's precedents 9
A. The court of appeals erred in failing to find A.B. 1889 preempted under *Machinists* and *Garmon* 9
B. The court of appeals misapplied *Boston Harbor* and *Gould* 13
II. The circuits are in conflict over the question presented 16
III. The question presented is important, and this case is an adequate vehicle for resolving it 19
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Boire v. *Greyhound Corp.*, 376 U.S. 473 (1964) 2
Building & Constr. Trades Council v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) 4, 13, 16, 19
Engine Mfrs. Ass'n v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) 23
Garner v. *Teamsters, Local Union No. 776*, 346 U.S. 485 (1953) 2, 11
General Shoe Corp., 77 N.L.R.B. 124 (1948) 12
Golden State Transit Corp. v. *City of L.A.*, 475 U.S. 608 (1986) 19
Harlan Fuel Co., 8 N.L.R.B. 25 (1938) 9

Cases—Continued: Page

Healthcare Ass'n of N.Y. State, Inc. v. *Pataki*, 471 F.3d 87 (2d Cir. 2006) 16, 17, 18, 19
Letz Mfg. Co., 32 N.L.R.B. 563 (1941) 3
Life Care Ctrs. v. *CalOptima*, 35 Cal. Rptr. 3d 387 (Ct. App. 2005) 6
Linden Lumber Div., Summer & Co. v. *NLRB*, 419 U.S. 301 (1974) 5
Linn v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) 3, 6, 10
Livadas v. *Bradshaw*, 512 U.S. 107 (1994) 19
Lodge 76, Int'l Ass'n of Machinists v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) 4, 10, 11
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) ... 2, 9, 12
NLRB v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) 11
NLRB v. *Nash-Finch Co.*, 404 U.S. 138 (1971) 20
NLRB v. *Virginia Elec. & Power Co.*, 314 U.S. 469 (1941) 3
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 3, 16, 18
Trent Tube Co., 147 N.L.R.B. 538 (1964) 9, 12
United States v. *Palumbo Bros.*, 145 F.3d 850 (7th Cir.), cert. denied, 525 U.S. 949 (1998) 1
Wisconsin Dep't of Indus. v. *Gould Inc.*, 475 U.S. 282 (1986) 3, 13, 14, 15

Constitution and statutes: Page

U.S. Const. Amend. I 21
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1
29 U.S.C. 153 2
29 U.S.C. 154 2
29 U.S.C. 157 (§ 7) 2, 9
29 U.S.C. 158 (§ 8) 2, 3
29 U.S.C. 158(a)(1) (§ 8(a)(1)) 12
29 U.S.C. 158(b)(4) 11
29 U.S.C. 158(c) (§ 8(c)) 3, 7, 10, 12, 17, 18
29 U.S.C. 159 (§ 9) 2
29 U.S.C. 159(c) 2, 14
29 U.S.C. 159(e) 2, 14
29 U.S.C. 160 (§ 10) 2
Cal. Gov't Code (West Supp. 2007):
§ 16645(a) 4
§ 16645(a)(1) 10
§ 16645.1 5
§ 16645.2 12
§ 16645.2(a) 5
§ 16645.2(c) 5
§ 16645.2(d) 5
§ 16645.3 5
§ 16645.4 5
§ 16645.5 6
§ 16645.6 6

Statutes–Continued: Page

§ 16645.7 12
§ 16645.7(a) 5
§ 16645.7(b) 5
§ 16645.7(c) 5
§ 16645.7(d) 5
§ 16645.8 ..... 5, 12
§ 16646(a) 5
§ 16646(b) 5
§ 16647(d) 5, 10, 14
Cal. Welf. & Inst. Code (West Supp. 2007):
§ 14126.02 21
§ 14126.023 21
2000 Cal. Stat. ch. 872, § 1 ..... 4, 10, 12, 14
Fla. Stat. Ann. § 400.334 (2006) 20
5 Ill. Comp. Stat. § 315/10(a)(6) (2005) 20
115 Ill. Comp. Stat. § 5/14(a)(9) (2006) 20
Me. Rev. Stat. Ann. tit. 22, §§ 1861-1867 (2004 & Supp. 2006) 20
Mass. Gen. Laws ch. 7, § 56 (1998) 20
Minn. Stat. § 256B.47, subd. 1 (2007) 20
N.Y. Lab. Law (McKinney Supp. 2007):
§ 211-a 16, 17, 18
§ 211-a(1) 17
§ 211-a(2) 17
N.D. Cent. Code § 50-24.4-07 (1999) 20
Ohio Rev. Code Ann. § 5119.62 (LexisNexis 2004) 20
R.I. Gen. Laws § 40-8.2-23 (2006) 20

Miscellaneous: Page

A.B. 2222, 212th Legis., (N.J. 2006) 20

California Dep't of Health Servs., *Methods and Standards for Establishing Facility-Specific Reimbursement Rates* (eff. Aug. 1, 2005) <www.dhs.ca.gov/mcs/mcpd/RDB/LTCSDU/pdfs/SPA%2004012%202105.pdf> 21, 22

H.B. 757, 95th Gen. Assem. (Ill. 2007) 20

H.B. 3267, 185th Gen. Ct., Reg. Sess. (Mass. 2007) 20

H.B. 4443, 94th Legis., 1st Reg. Sess. (Mich. 2007) 20

H.F. 1224, 85th Legis., Reg. Sess. (Minn. 2007) 20

S. 2701, 212th Legis. (N.J. 2007) 20

S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 3

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. a. Congress enacted the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, to "create a national, uniform body of labor law and policy, to protect the stability of the collective bargaining process, and to maintain peaceful industrial relations." *United States* v. *Palumbo Bros.*, 145 F.3d 850, 861 (7th Cir.), cert. denied, 525 U.S. 949 (1998). To accomplish those goals, Congress established an integrated scheme of rights, protections, and prohibitions governing employee, em-

ployer, and union conduct during organizing campaigns, representation elections, and collective bargaining. Congress also created a centralized administrative agency, the National Labor Relations Board (Board), to interpret and administer the NLRA and to resolve labor disputes. See 29 U.S.C. 153-154, 160; *Garner* v. *Teamsters, Local Union No. 776*, 346 U.S. 485, 490 (1953).

The NLRA protects employees' rights to join or not to join a union, and it provides a mechanism for peacefully and expeditiously resolving questions concerning union representation. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-479 (1964). Section 7 of the NLRA sets forth the core rights of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" and "to engage in other concerted activities" as well as the right "to refrain from any or all such activities." 29 U.S.C. 157. Section 8 defines and prohibits union and employer "unfair labor practices" that infringe on employees' Section 7 rights. 29 U.S.C. 158. Section 9 establishes procedures for the Board to use in regulating and certifying union elections, see 29 U.S.C. 159, and Section 10 authorizes the Board to adjudicate claims of unfair labor practices, see 29 U.S.C. 160. Pursuant to Section 9, the Board has determined that a secret ballot election is the preferred method for resolving representational disputes because it best protects employee free choice. See 29 U.S.C. 159(c), (e); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

The NLRA encourages the free flow of information from both unions and employers to employees as they consider whether to be represented by a union. Although the Board initially took the position that Section 8 of the NLRA demanded employer neutrality during

organizing campaigns, see, *e.g.*, *Letz Mfg. Co.*, 32 N.L.R.B. 563, 571-572 (1941), this Court held that Section 8 prohibits only coercive employer speech, see *NLRB* v. *Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941). Congress then amended the NLRA to "insure both to employers and labor organizations full freedom to express their views to employees on labor matters." S. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947). In particular, Congress added Section 8(c), which provides: "The expressing of any views, argument, or opinion, or the dissemination thereof * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 158(c). Section 8(c) thus "manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53, 62 (1966).

b. "[I]n passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dep't of Indus.* v. *Gould Inc.*, 475 U.S. 282, 286 (1986) (*Gould*). This Court has recognized two distinct NLRA preemption principles.

The first principle—enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) (*Garmon* preemption)—is that States may not regulate "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Gould*, 475 U.S. at 286; see *Garmon*, 359 U.S. at 244. *Garmon* preemption preserves the jurisdiction of the Board by precluding States from regulating the same conduct that Congress intended the Board to regulate under uniform national law. *Garmon*, 359 U.S. 242-244; see *Gould*, 475 U.S. at 286.

The second principle—recognized in *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*Machinists* preemption)—is that States may not regulate conduct that "Congress intended * * * 'to be controlled by the free play of economic forces.'" *Id.* at 140 (citation omitted). *Machinists* preemption preserves Congress's "intentional balance between the uncontrolled power of management and labor to further their respective interests." *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226 (1993) (*Boston Harbor*) (internal quotation marks and citations omitted).

2. In September 2000, California enacted Assembly Bill No. 1889, Cal. Gov't Code §§ 16645-16649 (A.B. 1889),[1] which prohibits entities that receive state funds from using the funds to "assist, promote, or deter union organizing." In order to prevent "interfere[nce] with an employee's choice about whether to join or to be represented by a labor union," the statute "prohibit[s] an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization." 2000 Cal. Stat. ch. 872, § 1.

The prohibition on "assist[ing], promot[ing], or deter[ring] union organizing" is expansively defined to include "any attempt by an employer to influence the decision of its employees" regarding "[w]hether to support or oppose a labor organization" or "whether to become a member of any labor organization." Cal. Gov't Code § 16645(a). The statute's spending restriction applies to "any expense, including legal and consulting fees

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[1] Unless otherwise noted, all citations to Cal. Gov't Code §§ 16645-16649 are to the 2007 supplement.

and salaries of supervisors and employees, incurred for * * * an activity to assist, promote, or deter union organizing." *Id.* § 16646(a). A.B. 1889 exempts certain categories of labor relations expenses from its broad prohibition, however, including expenses incurred in "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization," *i.e.*, expenses incurred by an employer in agreeing to recognize a union without insisting that the union first be chosen as the employees' bargaining representative by secret ballot. *Id.* § 16647(d); see *Linden Lumber Div., Summer & Co.* v. *NLRB*, 419 U.S. 301, 309-310 (1974).

A.B. 1889 contains extensive compliance and enforcement provisions. Entities that receive state funds must "provide a certification to the state that none of the funds will be used" for prohibited expenditures, Cal. Gov't Code §§ 16645.2(c), 16645.7(b), and "maintain records sufficient to show" their compliance, *id.* §§ 16645.2(c), 16645.7(c). The statute presumes that funds received from the State are commingled and spent on prohibited activities unless an employer can demonstrate otherwise. See *id.* § 16646(b). Moreover, suspected violators may be sued by the state Attorney General or any private taxpayer for injunctive relief, treble damages, attorney's fees, and costs. See *id.* §§ 16645.2(d), 16645.7(d), 16645.8.

At issue here are the portions of A.B. 1889 regulating spending by any private employer that receives either "a grant of state funds," Cal. Gov't Code § 16645.2(a), or more than $10,000 per year "on account of its participation in a state program," *id.* § 16645.7(a).[2]

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[2] A.B. 1889 also regulates state contractors, Cal. Gov't Code §§ 16645.1, 16645.3, 16645.4; employers conducting business on state

One type of "program" at issue is Medi-Cal, the state Medicaid program, in which California reimburses healthcare providers when they provide healthcare services for eligible citizens. The reimbursement amount is based in part on providers' reported "allowable costs" under the terms of the Medi-Cal program, which prohibits reimbursement for "provider expenditures to assist, promote, or deter union organizing." C.A. E.R. 48, 56. A.B. 1889 supplements that restriction by "regulat[ing] the manner in which Medi-Cal providers may spend state funds" once a provider has received funds from the State as payment for a service. State's Summ. J. Reply 16 (C.D. Cal. filed Aug. 30, 2002) (No. 02-CV-377) (State's Summ. J. Reply).[3]

3. Petitioners challenged A.B. 1889 in federal district court, alleging that the statute is preempted by the NLRA under both *Machinists* and *Garmon*. The district court granted partial summary judgment for petitioners. Pet. App. 140a-149a. It held that A.B. 1889's restrictions on grant and program funds are preempted under *Machinists*, because the NLRA "manifests a congressional intent to encourage free debate on issues dividing labor and management," *id.* at 146a (quoting *Linn*, 383 U.S. at 62), and A.B. 1889 "prevent[s] this free debate" by "regulat[ing] employer speech about union organizing," *id.* at 147a. The court rejected respondents' contention that A.B. 1889 is a permissible means of "controlling the use of state funds" as a "'market participant,'" holding that the statute is regulatory, not

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property, *id.* § 16645.5; and public employers, *id.* § 16645.6. Those restrictions are not at issue in this case. See Pet. App. 3a, 142a-143a.

[3] The Medi-Cal program also has a managed care aspect, *e.g.*, *Life Care Ctrs. of Am.* v. *CalOptima*, 35 Cal. Rptr. 3d 387, 389 (Ct. App. 2005), which does not appear to be at issue in this case.

proprietary, in nature. *Id.* at 147a-148a (citation omitted).

4. a. A panel of the court of appeals affirmed the district court, both in an initial opinion, Pet. App. 114a-139a, and in a second opinion after granting panel rehearing, *id.* at 58a-113a. The court of appeals then granted en banc review and reversed and remanded. *Id.* at 1a-57a.

At the outset, the court rejected respondents' argument that A.B. 1889 is proprietary, rather than regulatory, in nature. Pet. App. 7a-12a. The court noted that "[t]he statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services"; instead, it indicates "a general state position of neutrality with regard to organizing" and a desire to impact "an employer's attempt to influence employee choice about whether to join a union." *Id.* at 11a-12a.

Despite A.B. 1889's regulatory purpose, the court of appeals concluded that the statute's grant and program restrictions "do not undermine federal labor policy." Pet. App. 3a. The court held that *Machinists* preemption does not apply to A.B. 1889 because employer speech regarding union organizing is not an area that Congress intended to be free from "*all* regulation." *Id.* at 19a-21a. The court also found the State's regulation of employer speech permissible because "the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces." *Id.* at 17a.

The court found *Garmon* preemption inapplicable as well, reasoning that while Section 8(c) "prohibits sanctioning employers" for "exercis[ing] speech rights," it "does not *grant* employers speech rights." Pet. App. 23a, 25a. The court also found "no potential overlap be-

tween the [Board's] jurisdiction and that of a state court hearing a suit brought under AB 1889." *Id.* at 29a-30a. In any event, the court concluded, California's substantial interest "in determining how the recipients of state grant and program funds use those funds" would save A.B. 1889. *Id.* at 30a.

b. Three judges dissented. They explained that "AB 1889 prohibits not just the use of state money granted to an employer for and under a specific program"; it also restricts how state funds may be used even after an employer has "fully performed" its obligation to the State and the funds "can no longer be considered 'state funds.'" Pet. App. 36a-39a (Beezer, J., dissenting). They concluded that A.B. 1889 is preempted under *Machinists* because the NLRA generally "takes a *laissez faire* approach to employee and employer speech, allowing passionate, partisan debate * * * during a union organizing campaign," and A.B. 1889 interferes with that unregulated zone. *Id.* at 48a-49a, 53a. And they found A.B. 1889 preempted under *Garmon* because it "stifles employer speech rights" that are protected by Section 8(c) of the NLRA and guarded by the Board. *Id.* at 51a, 53a.

DISCUSSION

In enacting A.B. 1889, California has adopted a policy of coercing certain employers to remain silent in response to union organizing efforts. That state labor policy conflicts with the NLRA's longstanding policy in favor of robust debate during organizing drives and impinges on the Board's generally exclusive authority to regulate employer speech regarding union organizing. The court of appeals' conclusion that A.B. 1889 triggers neither *Machinists* nor *Garmon* preemption reflects an incorrect and exceedingly narrow view of this Court's

precedents and conflicts with the decision of another court of appeals. The question whether a State may impose restrictions contrary to federal policy on entities accepting state funds in order to further its own labor relations policy is an important and recurring one that warrants this Court's consideration, and this case provides an appropriate vehicle for addressing it. Accordingly, the petition for a writ of certiorari should be granted.

I. THE DECISION BELOW DEPARTS SIGNIFICANTLY FROM THIS COURT'S PRECEDENTS

A. The Court Of Appeals Erred In Failing To Find A.B. 1889 Preempted Under *Machinists* And *Garmon*

The court of appeals erred in failing to recognize that employer speech regarding unionization is an area that Congress intended to be generally free of state regulation. A fundamental policy underlying the NLRA is the importance of robust debate as a means of protecting the Section 7 rights of employees to make informed decisions about whether to select an exclusive bargaining representative. See *Gissel Packing Co.*, 395 U.S. at 617-618; *Trent Tube Co.*, 147 N.L.R.B. 538, 541 (1964); *Harlan Fuel Co.*, 8 N.L.R.B. 25, 32 (1938). The Ninth Circuit failed to protect that important federal policy from interference by taking an unduly narrow view of the *Machinists* doctrine. Moreover, the Ninth Circuit erred in failing to find A.B. 1889 preempted by *Garmon* to the extent it regulates employer speech that has been left to the Board to regulate.

1. A.B. 1889 is preempted under *Machinists* because it regulates employer speech that Congress intended to leave unregulated. Congress recognized that non-coer-

cive employer speech during organizing campaigns is vital to ensuring that employees make free and informed choices regarding union representation, and it added Section 8(c) to the NLRA to ensure that such speech would remain unregulated. *E.g.*, *Linn*, 383 U.S. at 62. A.B. 1889 impermissibly regulates employer speech by penalizing "any attempt" by an employer "to influence the decision of its employees" regarding "[w]hether to support or oppose" unionization. Cal. Gov't Code § 16645(a)(1).

Moreover, A.B. 1889 does not apply its constraints on employer speech neutrally. While purporting to implement a blanket policy against "interfer[ence] with an employee's choice about whether to * * * to be represented by a labor union" (2000 Cal. Stat. ch. 872, § 1), A.B. 1889 subsidizes employer waivers of secret ballot elections—thereby weakening the safeguard that the Board has determined (see p. 2, *supra*) best protects employee free choice with respect to union representation. See Cal. Gov't Code § 16647(d) (permitting employers to use funds received from the State to negotiate and administer voluntary recognition agreements with unions). By encouraging regulated employers to grant recognition without an election, while making it difficult or impossible for them to participate meaningfully in an election if one is held, A.B. 1889 upsets the balance struck by the NLRA and denies employers "'a weapon that Congress meant [them] to have available.'" *Machinists*, 427 U.S. at 150 (citation omitted).

The court of appeals erred in deeming *Machinists* inapplicable on the ground that "employer speech in the context of organizing" is not a "zone[] of activity" that Congress left free from "*all* regulation." Pet. App. 19a; see also *id.* at 21a. *Machinists* preemption operates

within a framework of extensive Board regulation of numerous aspects of the management-labor relationship. Thus, *Machinists* can apply in an area in which Congress has broadly defined protected and unprotected activities and has empowered the Board to define the contours of those activities, as long as the "particular activity" at issue is "an activity that Congress intended to be 'unrestricted by *any* governmental power to regulate.'" 427 U.S. at 141 (citation omitted).

In *Machinists* itself, for example, the Court held that state law was preempted even though the general "zone of activity" at issue—the use of economic weapons in labor disputes—was the subject of extensive regulation under the NLRA. Congress had proscribed the use of some economic weapons, left others unregulated, and authorized the Board to draw lines consistent with the statute. See 29 U.S.C. 158(b)(4); *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960). The *particular* economic weapon at issue, however—a concerted refusal to work overtime aimed at pressuring an employer in a collective bargaining dispute—had been left *unregulated*, and therefore could not be regulated by the States without impermissibly "'denying one party to an economic contest a weapon that Congress meant him to have available.'" *Machinists*, 427 U.S. at 150 (citation omitted); see *id.* at 142-151; see also *Garner*, 346 at 499-500 ("The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. * * * For a state to impinge on the area of labor combat designed to be free is * * * an obstruction of federal policy."). The Ninth Circuit therefore erred, and departed from this Court's

precedents, in holding that *Machinists* does not apply here.

2. The court of appeals also erred in circumscribing the reach of *Garmon*. *Garmon* preemption principles apply to A.B. 1889 because, in addition to regulating employer speech that Congress deliberately left unregulated, the statute also regulates coercive or prejudicial employer speech during organizing campaigns, and Congress assigned that regulatory function to the Board. The Board has primary jurisdiction to draw the line between coercive speech that violates Section 8(a)(1), *Gissel Packing Co.*, 395 U.S. at 620, or is prejudicial to a fair election, see *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948), and non-coercive speech that enhances employee free choice and is therefore immune from regulation, see 29 U.S.C. 158(c); *Trent Tube Co.*, 147 N.L.R.B. at 541.

There is no place in the NLRA's comprehensive regulatory scheme for state regulation of employer speech to effectuate state labor policy. A.B. 1889 regulates a broad swath of employer speech regarding unionization—including speech that falls close to, and on either side of, the line drawn by the NLRA—in order to advance California's goal of preventing regulated employers "from seeking to influence employees to support or oppose unionization." 2000 Cal. Stat. ch. 872, § 1. Moreover, A.B. 1889 subjects all regulated employers to the substantial risk and burden of state investigation, private suits, treble damages, and attorney's fee awards in the event an employer fails to meet its burden of demonstrating that no state funds were commingled with funds used for employer speech regarding unionization. See Cal. Gov't Code §§ 16645.2, 16645.7, 16645.8.

Accordingly, A.B. 1889 is preempted under *Garmon*, because it regulates employer speech that the NLRA "prohibits, or arguably * * * prohibits," *Gould*, 475 U.S. at 286, and intrudes on the Board's primary jurisdiction to determine when employer speech regarding union organizing is impermissible. As this Court recognized in *Gould*, "'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,'" and the States are therefore barred "from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.* at 286 (citation omitted).

B. The Court Of Appeals Misapplied *Boston Harbor* And *Gould*

The court of appeals held that A.B. 1889 is saved from preemption because a State may regulate the use of its own funds. See Pet. App. 16a-19a, 31a-32a. That holding rests on a substantial misreading of this Court's precedents. In considering claims of NLRA preemption, this Court has found certain government contract conditions that affect labor permissible when the government acts in its proprietary capacity as a "market participant." *Boston Harbor*, 507 U.S. at 227, 229-231. As this Court has explained, the distinction "between government as regulator and government as proprietor" is crucial, because "pre-emption doctrines apply only to state *regulation*." *Id.* at 227. And a state regulatory measure does not escape preemption merely because it regulates using the State's spending power. See *Gould*, 475 U.S. at 287.

Here, the court of appeals correctly found (Pet. App. 11a) that A.B. 1889 is "regulatory" and is "not protected by the market participant exception." As a state regula-

tory measure, A.B. 1889 is therefore subject to the normal standards for *Machinists* and *Garmon* preemption, and, as discussed (see pp. 9-13, *supra*), it is preempted under those standards. Once it is established that A.B. 1889 is a regulatory measure and is preempted under *Machinists* or *Garmon*, the means used by the State to achieve its regulatory objective—restricting the use of funds received from the State—are irrelevant to the preemption analysis. In concluding otherwise, the court of appeals mistakenly reintroduced market participant principles through the backdoor and effectively created an entirely new exception to NLRA preemption that cannot be reconciled with *Gould* and *Boston Harbor*.

As the court of appeals correctly acknowledged, A.B. 1889 is plainly regulatory, and not merely proprietary, under this Court's precedents. The statute's stated purpose and effect is to further a labor policy of (selective) employer silence regarding union organizing, a policy in direct conflict with federal labor policy. See 2000 Cal. Stat. ch. 872, § 1. A.B. 1889 upsets the balance struck by the NLRA and applies regulatory pressure in favor of unionization by impeding or silencing employers who would oppose union organizing efforts, while allowing funds received from the State to be used for any labor costs *except* the costs of employer speech regarding unionization. For example, A.B. 1889 permits state funds to be spent on voluntary recognition agreements, see Cal. Gov't Code § 16647(d), despite an employer's right to require that representational disputes be resolved using a secret ballot. See 29 U.S.C. 159(c) and (e). Moreover, "the essentially punitive rather than corrective nature" of A.B. 1889's comprehensive enforcement scheme underscores its regulatory goal. *Gould*, 475 U.S. at 288 n.5.

Although a State has a legitimate proprietary interest in ensuring that state funds appropriated for a proper purpose are spent in accordance with that purpose, A.B. 1889's restrictions on grant recipients are not of that type. Rather than adopting a neutral requirement that grant funds may be spent solely for the purposes of the relevant grant program, for example, A.B. 1889 allows funds to be spent for any labor costs other than the costs of employer speech regarding union representation. Thus, A.B. 1889's grant restrictions operate in a regulatory fashion by targeting a particular category of disfavored employer speech, and cannot be justified as a "legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S. at 291.

A.B. 1889's restrictions on state program participants also extend beyond any arguably legitimate proprietary interest. For example, the State's Medi-Cal program already includes detailed rules specifying which costs the State views as reimbursable, ensuring that California reimburses institutional providers only for those expenses. See C.A. E.R. 48, 56. A.B. 1889 goes beyond those restrictions by regulating how service providers may use funds received from the State even after the service has been provided and the funds can no longer be considered "state funds." See State's Summ. J. Reply 16. California has no legitimate *proprietary* interest in controlling what a healthcare provider does with reimbursement payments it has earned by providing covered medical services.

Thus, California's invocation of its spending power cannot save its regulation of labor relations from preemption. A.B. 1889 is plainly not an example of a "State act[ing] as a market participant with no interest in set-

ting policy." *Boston Harbor*, 507 U.S. at 229. It is instead a state regulatory measure designed to advance California's chosen labor policies, and it must therefore be judged under the preemption standards applicable to such state regulation. *Id.* at 227.

Moreover, having correctly recognized that A.B. 1889 involves regulation, not the State's proprietary role as a market participant, the court of appeals erred in finding *Machinists* preemption inapplicable because the State's spending decisions are not controlled by market forces. The proper place to consider the relevance, if any, of the fact that A.B. 1889 takes the form of a restriction on spending is in the initial consideration of whether it falls within the market participant exception. Having correctly concluded that A.B. 1889 is in substance regulatory, the court of appeals erred in relying on "the state's choices of how to spend its funds" as a basis for rejecting *Machinists* preemption. Pet. App. 17a.[4]

II. THE CIRCUITS ARE IN CONFLICT OVER THE QUESTION PRESENTED

In *Healthcare Ass'n of New York State, Inc.* v. *Pataki*, 471 F.3d 87 (2006), the Second Circuit considered whether New York Labor Law § 211-a (McKinney Supp. 2007) (Section 211-a) is preempted by the NLRA. Like A.B. 1889, Section 211-a prohibits entities from using any "monies appropriated by the state" for "encourag[ing] or discourag[ing] union organization" or

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[4] For essentially the same reasons, the court of appeals erred in holding that A.B. 1889 is saved from preemption because a State's exercise of its spending power is "deeply rooted in local feeling and responsibility." Pet. App. 30a-31a (quoting *Garmon*, 359 U.S. at 243-244).

"participati[on] in a union organizing drive." *Id.* § 211-a(2). The statute's stated purpose is to "ensure that funds appropriated by the legislature for the purchase of goods and provision of needed services are ultimately expended solely for the purpose for which they were appropriated." *Id.* § 211-a(1).

The plaintiffs, healthcare providers, argued that Section 211-a impermissibly conditions receipt of state funds on an employer's neutrality regarding union representation. See 471 F.3d at 91-92. They explained that Section 211-a prohibits employer speech using state funds even after the State has paid for and received the goods or services for which it bargained, thus preventing them "from using their own money to communicate with their employees regarding whether it is desirable to unionize." *Id.* at 92.

The Second Circuit found both *Machinists* and *Garmon* preemption principles applicable to Section 211-a. Its analysis diverged from that of the Ninth Circuit in several important respects.

A. The Second Circuit applied *Machinists* preemption because it found that employer speech during union organizing campaigns is an area in which Congress generally intended to allow "'the free play of economic forces.'" 471 F.3d at 107 (citation omitted). The court explained that "the protection afforded by section 8(c) is to leave employer speech largely unregulated." *Ibid.* The Ninth Circuit, by contrast, held that the Board's ability to regulate coercive or prejudicial employer speech precludes *Machinists* preemption. See Pet. App. 19a-20a & n.11.

B. The Second Circuit also held that Section 8(c) "protect[s] employer speech in the unionization campaign context and can provide a basis for *Gar-*

mon preemption." 471 F.3d at 97, 100. In concluding that *Garmon* applied, the court expressly rejected the view, accepted by the Ninth Circuit, that Section 8(c) does not affirmatively protect speech but "merely states that such speech will not be sanctionable as an unfair labor practice." *Id.* at 99; cf. Pet. App. 23a-24a.

C. In evaluating whether Section 211-a is saved from preemption as an exercise of the State's proprietary authority, the Second Circuit again took a different approach from that of the Ninth Circuit. The Second Circuit explained that "a government can 'make a value judgment favoring' [certain] conduct" and "implement that judgment by allocating public funds in a [certain] way," but it "cannot leverage its money to affect" an employer's activity "beyond [its] dealings with the State." 471 F.3d at 101-102 (citations omitted). The court thus determined that whether Section 211-a is preempted depends upon the "State's and the employers' respective rights in the funds at issue," which "are determined by the nature of the transaction by which the money changed hands." *Id.* at 101-102 n.7. In the Second Circuit's view, a State may place "restriction[s] on what use may be made of State grants," but it may not restrict the "use of proceeds earned from state contracts and statutory reimbursement obligations in which the contractor's labor costs cannot affect the amount of expense to the State." *Id.* at 105.

In contrast, the Ninth Circuit held that A.B. 1889's restrictions on both grant and program funds are valid because the statute restricts only the use of state funds, and "a state's control of its purse strings" is an issue "deeply rooted in local feeling and responsibility." Pet. App. 31a-32a (quoting *Garmon*, 359 U.S. at 244). In so holding, the Ninth Circuit approved restrictions that the

Second Circuit would find preempted. For example, with respect to state Medicaid funds, the Second Circuit upheld "restrictions on reimbursable costs" but not "restrictions on what can be done with money once it has changed hands," 471 F.3d at 104, whereas the Ninth Circuit approved both, see Pet. App. 34a-35a & n.23; see also pp. 5-6, 15, *supra*. Thus, the decision below conflicts in several respects with the Second Circuit's decision in *Healthcare Association*.

III. THE QUESTION PRESENTED IS IMPORTANT, AND THIS CASE IS AN ADEQUATE VEHICLE FOR RESOLVING IT

A. The question whether a State may regulate labor relations using its spending power is an important one that implicates the uniformity of the national labor relations regulatory scheme embodied in the NLRA and administered by the Board. This Court has deemed substantial claims of state interference with federal labor policy sufficiently important to warrant review without regard to any conflict in the circuits. See, *e.g.*, *Livadas* v. *Bradshaw*, 512 U.S. 107, 116 (1994); *Boston Harbor*, 507 U.S. at 224; *Golden State Transit Corp.* v. *City of L.A.*, 475 U.S. 608, 613 (1986). Here, the conflict between the Second and Ninth Circuits has created uncertainty regarding the nature of the restrictions, if any, that a State may place on the use of funds received from the State as a means of regulating employer speech regarding unionization.

The question presented is likely to recur, because California's attempt to regulate labor relations using its spending power is not unique. In addition to California and New York, eight States have enacted laws of varying breadth that prohibit the use of state funds to en-

courage or discourage union organizing.[5] And efforts are underway in at least five States to enact legislation patterned specifically on the California statute.[6] Those legislative efforts threaten to undermine the purpose of the NLRA, which was to "obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (citation omitted).

Indeed, A.B. 1889 appears to have altered significantly the balance of labor relations in California, with unions "aggressively us[ing] A.B. 1889 to gain a special advantage in labor disputes" by, for example, "alleging violations of the statute in an effort to coerce employers" to refrain from any speech during unionization drives. Pet. App. 46a (Beezer, J., dissenting). The potential for disruption of the carefully calibrated NLRA regulatory scheme is substantial. This Court's review is therefore warranted.

B. This case is an appropriate vehicle for resolving the question presented. First, although respondents assert that petitioners brought only a facial challenge to A.B. 1889, petitioners' complaint appears to have sought

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[5] See Fla. Stat. Ann. § 400.334 (2006); 5 Ill. Comp. Stat. § 315/10(a)(6) (2005); 115 Ill. Comp. Stat. § 5/14(a)(9) (2006); Me. Rev. Stat. Ann. tit. 22, §§ 1861-1867 (2004 & Supp. 2006); Mass. Gen. Laws ch. 7, § 56 (1998); Minn. Stat. § 256B.47, subd. 1 (2007); N.D. Cent. Code § 50-24.4-07 (1999); Ohio Rev. Code Ann. § 5119.62 (LexisNexis 2004); R.I. Gen. Laws § 40-8.2-23 (2006).

[6] See H.B. 757, 95th Gen. Assem. (Ill. 2007); H.B. 3267, 185th Gen. Ct., Reg. Sess. (Mass. 2007); H.B. 4443, 94th Legis., 1st Reg. Sess. (Mich. 2007); H.F. 1224, 85th Legis., Reg. Sess. (Minn. 2007); S. 2701, 212th Legis. (N.J. 2007); A.B. 2222, 212th Legis. (N.J. 2006).

relief consistent with an as-applied challenge, such as an injunction against requiring Medi-Cal providers in particular to comply with the statute's certification requirement. C.A. E.R. 27. In any event, the facial/as-applied distinction does not appear to be material at this juncture of the case. While the court of appeals suggested (Pet. App. 7a, 34a, 36a) that petitioners' First Amendment claims involved a facial attack on A.B. 1889, petitioners seek review only on the question of preemption, not any First Amendment claim, and the court of appeals held that *Machinists* and *Garmon* are categorically inapplicable to A.B. 1889. Pet. App. 13a-32a, 36a. Those holdings foreclose any further facial *or* as-applied challenge to the grant and program provisions upheld here.

Although the case was decided on summary judgment and the record does not contain extensive factual detail, there appears to be sufficient information to permit an informed adjudication of petitioners' challenge to A.B. 1889 as it applies to programs like Medi-Cal. The record in this case reveals that several petitioners are long-term care facilities that receive state Medi-Cal funds "in the form of reimbursement for services provided to beneficiaries." C.A. Supp. E.R. (S.E.R.) 3; C.A. E.R. 14; see S.E.R. 46-48, 54-57, 63-66, 69-72, 736-739, 740-743. Those entities regularly submit reports of "allowable costs" to the State, and the State sets Medi-Cal reimbursement rates (a fixed amount per day per beneficiary) relying in part on those cost reports. See C.A. E.R. 48, 55-60; see also Cal. Welf. & Inst. Code §§ 14126.02, 14126.023 (West Supp. 2007); see generally California Dep't of Health Servs., *Methods and Standards for Establishing Facility-Specific Reimbursement Rates* (eff. Aug. 1, 2005) <www.dhs.ca.gov/mcs/

mcpd/RDB/LTCSDU/pdfs/SPA%2004012%202105.pdf>. Under the state Medi-Cal plan, "allowable costs do not include expenditures to assist, promote, or deter union organizing to the extent such expenditures are paid by the provider with State funds." C.A. E.R. 48-49; see *id.* at 56-59.

A.B. 1889 thus imposes a separate requirement on Medi-Cal recipients beyond the requirements of the Medi-Cal program itself:

> While A.B. 1889 regulates the manner in which Medi-Cal providers may spend state funds, it does not govern which expenditures are used to determine the prospective reimbursement rates ultimately set by the state for different classes of Medi-Cal providers statewide. The latter is instead governed by the cost reporting requirements of the State Medicaid Plan.

State's Summ. J. Reply 16. The court of appeals considered and upheld the application of A.B. 1889 to Medi-Cal funds, see Pet. App. 34a-35a & n.23, and accordingly the correctness of that determination is properly before the Court.

Respondents are correct (Br. in Opp. 20) that a "more extensive factual record" may be developed on remand, but that is not a basis for denying review. The court of appeals' decision raises pure questions of law that may be reviewed without further factual development and that resolve the preemption question with respect to A.B. 1889's grant and program restrictions. Moreover, the record contains sufficient information to permit evaluation of A.B. 1889's application to the Medi-Cal program in particular. Although the record is more sparse with respect to the application of A.B. 1889 to

grant recipients, that deficiency is unlikely to be remedied on remand, because the judgment below appears to foreclose any further preemption challenge to the grant and program provisions. The court of appeals' legal conclusions with respect to the grant provisions could be reviewed and, if appropriate, corrected, with any necessary factual details to be addressed on remand under the proper legal standard. Cf. *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004). Review at this stage of the proceedings is justified in light of the conflict in the circuits and the significant threat posed by A.B. 1889 and similar statutes to the uniform federal labor relations scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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